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the Second Affidavit of Teresa A. Hill (the "Affidavits").

Although Defendant asserts that the filing of these Affidavits is proper, timely, and so provided for in Federal Rule of Civil Procedure 6(d), Defendant is filing the instant motion in an abundance of caution.

Pursuant to Rule 6(d) of the Federal Civil Rules, "opposing affidavits may be served not later than 1 day before the hearing" FRCP 6(d); *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1519 (9th Cir. 1983). The Affidavits Defendant seeks to file are responding to, in part, the affidavits of Jason Shaw and Daniel Williams (Docket Nos. 145-147). Consequently, since the Conditional Certification Hearing is set for September 11, 2002 (Docket No. 99), Defendant's Affidavits are timely and properly filed today.

Moreover, Defendant's Affidavits are also necessary because Plaintiffs have raised new arguments and evidence in their reply briefing (docket nos. 144-147). Specifically, Plaintiffs have asserted new arguments in their reply briefing regarding their ever-shifting allegations on the issue of calculation of the overtime premium rate.

Where new evidence is presented in a party's reply brief or affidavit in further support of its motion, the district court should permit the nonmoving party to respond to the new matters prior to disposition of the motion. *See, e.g., Black v. TIC Inv. Corp.*, 900 F.2d 112, 116 (7th Cir. 1990); *Clinkscales v. Chevron U.S.A., Inc.*, 831 F.2d 1565, 1568 n. 9 (11th Cir. 1987); *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 409-10 (1st Cir. 1985).

Thus, in the event the Court determines that Defendant cannot file its Affidavits pursuant to Rule 6(d), Defendant moves to have the Affidavits filed as "sur-reply" affidavits. *See, e.g.,*

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Alaska Wildlife Alliance v. Jensen, 108 F.3d 1065, 1068, n.5 (9th Cir. 1997) (noting that defendant had waived objection to affidavits submitted with plaintiffs' reply brief, because "[i]f [defendant] wanted a chance to respond to the affidavits, it could have moved to file a surreply"); *Annett v. University of Kansas*, No. 01-2367-JAR, 2002 WL 31006462, *13, (D.Kan. Sep 04, 2002) (granting plaintiff's motion to file a surreply because defendant's reply brief raised several new arguments to which plaintiff is entitled to respond); *Hammett v. American Bankers Insurance Co.*, 203 F.R.D. 690, 695, n.1 (S.D.Fla. 2001) (granting defendants' motion for leave to file a sur-reply because plaintiff presented new arguments and a new theory for class certification in her reply).

Based on the foregoing, Defendant respectfully requests that the Court grant Defendant's Motion for Leave to File Opposing Affidavits in Support of Defendant's Conditional Certification Opposition.

DATED this 10th day of September, 2002.

STOEL RIVES LLP



Teresa A. Hill


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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of September, 2002, a true and correct copy of the foregoing **DEFENDANT'S MOTION FOR LEAVE TO FILE OPPOSING AFFIDAVITS IN SUPPORT OF CONDITIONAL CERTIFICATION OPPOSITION** was served on the following individuals by the manner indicated:

William H. Thomas
Daniel E. Williams
Christopher F. Huntley
HUNTLEY, PARK, THOMAS,
BURKETT, OLSEN & WILLIAMS
250 S. Fifth Street, Suite 660
Boise, Idaho 83701-2188

[] By U.S. Mail
[X] By Hand Delivery
[X] By Facsimile
[] By Overnight Delivery


Teresa A. Hill

**DEFENDANT'S MOTION FOR LEAVE TO FILE OPPOSING AFFIDAVITS IN
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